STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 4-79;	)	
LEWIS AND CLARK COUNTY, Petitioner,	)	FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER
vs	)	
MONTANA PUBLIC EMPLOYEES ASSOCIATION, INC. Respondent.	)	

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I. INTRODUCTION

Petitioner filed for unit clarification under ARM 24.26.534 on August 10, 1979 seeking to exclude an administrative secretary and two deputy probation officer positions from a bargaining unit of Lewis and Clark County employees represented by Respondent. After determining that question of fact existed, the matter was heard under authority of 39-31-207 MCA on November 20, 1979. Petitioner was represented by Mr. Leonard York; Respondent was represented by Mr. Barry Hjort.

II. ISSUES

1. Whether the administrative secretary to the administrative assistant to the Board of Commissioners of Lewis and Clark County is a confidential labor relations employee under 39-31-103 (12) MCA.

2. Whether the deputy probation officer position should be excluded from the bargaining unit on the grounds that: (a) the Petitioner is not the employer, (b) they lack a sufficient mutuality of interest with other members of the unit, or (c) they are professional employees.

III. FINDINGS OF FACT

1. Respondent is the exclusive representative of "... all chief Deputies and Assistant Deputies in the office of the Clerk and Recorder, Auditor, Treasurer, and Clerk of the Court; all Probation officers in the Probation Department; all Secretaries, Bookkeepers, Clerks and Stenographers in the

Courthouse of Lewis and Clark County, Helena, Montana as certified by the Board of Personnel Appeals, State of Montana, October 21, 1976..." under the terms of the parties' current collective bargaining agreement.

2. The administrative assistant to the Board of Commissioners of Lewis and Clark County performs duties involved with the preparation and review of the budget, personnel administration, labor relations and special assignments. He deals directly with four labor unions, sits in on contract negotiations, prepares typewritten prosposals and counter-proposals for review by the County Attorney and Board of Commissioners, develops policy recommendations and develops bargaining strategies for review. He also is responsible for the administration of five collective bargaining agreements including the handling of grievances. His office houses the county's comprehensive personnel files which contain, among other things, information on labor relation matters.

3. The administrative secretary is reponsible directly to the administrative assistant. She performs all the office clerical work including the typing and filing duties. She also transcribes recordings from grievance hearings, has one of the two keys to the personnel files, answers general questions regarding labor relations policy when the administrative assistant is out and performs the necessary clerical duties involved when fact-finding or unfair labor charge proceedings are in process. She takes notes at conferences of the Commissioners and their administrative assistant dealing with bargaining strategies and labor relations in general.

4. Petitioner and Respondent have agreed to exclude two administrative secretaries in the County Commissioners' office and one para-legal position in the County Attorney's office from the Bargaining unit on the basis they are confidential. The Commissioner's secretaries perform some of the work of the

secretary to the administrative assistant, but only when she is absent from work.

5. The formal title of the subject position is Personnel Technician/Administrative Secretary.

6. The youth court judge of each judicial district in the state appoints persons to fill probation officer positions. The duties of such positions are enumerated in 41-5-703 MCA. He also appoints persons to fill deputy probation officer positions and fixes their salaries within the statutory minimum and maximum, i.e. not less than 60% or more than 90% of the Chief Probation Officer's salary. The minimum salary provision of the law was enacted by the 1979 Legislature effective July 1, 1979.

7. The existing collective bargaining agreement entered into by the parties is in effect until June 30, 1980. Pertinent parts of that contract are: (a) Respondent is the exclusive representative for, among others, all probation officers in the Probation Department and (b) special provision was made by the parties to exclude deputy probation officers from that part of the overtime clause (Article VI, Section 1) which requires Petitioner to pay at one and one-half the regular rate for all hours over eight in a day; they receive overtime pay only where they work more than forty hours in a week.

8. Deputy probation officers work irregular hours. They are on occasion called out at night and on weekends. Their irregular hours because of call-outs is roughly comparable to those of a deputy sheriff.

9. Senate Bill No. 106 of the 1979 Legislature, was enacted, effective July 1, 1979, to provide salary increases for probation officers and a minimum salary for deputy probation officers. Section 41-5-705 MCA was amended by SB106 to read:

> Deputy probation officer-salary. The judge having jurisdiction of juvenile matters may also appoint such additional persons, giving preference to persons having the qualifica-

tions suggested for appointment as the chief probation officer, to serve as deputy probation officers as the judge deems necessary, their salaries to be fixed by the judge. Such salaries shall not exceed 90% or be less than 60% of the salary of the chief probation officer.

10. Deputy probation officers work in more than one county. If there were a disagreement between the County Commissioners and the District Court over the salary setting of a deputy probation officer, the Court would order the Commissioners to fund the salary as set by the Court.

11. The Probation Department is comprised of five positions, chief probation officer, two deputy probation officers, one restitution worker and one secretary.

12. The deputies are professional employees.

IV. OPINION

The 1979 Legislature amended the Collective Bargaining for Public Employees Act to exclude persons found by this Board to be confidential labor relations employees. As was pointed out in the hearing examiner's decision in Montana Public Employees Association vs. Montana Department of Labor and Industry, UD18-79, issued October 22, 1979, the criteria used by the Board of Personnel Appeals to determine whether one is a confidential labor relations employee should be those set forth in Siemens Corp., 224 NLRB 216, 92 LRRM 1455 (1976). There the NLRB held that if the employee acts in a confidential capacity, during the normal course of duties, to a person who is involved in formulating, determining and effectuating the employer's labor relations policy, he or she should be excluded from any appropriate unit. Prior to Siemens the NLRB had held to a stricter definition of confidential employee. In B.F. Goodrich, 115 NLRB 722, 37 LRRM 1383 (1956) it ruled that the definition used in Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1946) should be strictly followed. In Ford it held that those employees who assist and act in a confidential capacity to persons who exercise managerial functions in the field of

labor relations should not be in a bargaining unit of rank and file workers. The NLRB went on to say in Goodrich that only those employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations should be excluded.

Applying the facts here to the criteria suggested in UD18-79, I am compelled to conclude the administrative secretary to the administrative assistant is a confidential labor relations employee. The record shows she performs a wide range of clerical duties including typing, filing, answering general inquiries and transcribing. She takes notes at strategy conferences of the Commissioners and the administrative assistant, and performs the necessary clerical duties involved with grievance, fact-finding and unfair labor practice charges. Her supervisor is clearly a person who is involved in formulating, determining and effectuating his employer's labor relations policy. He is responsible for the administration of the County's personnel system including its relations with labor organizations. He makes labor policy recommendations to the Commissioners, sits in on negotiations and administers the contracts after they are executed. The only question raised in this case was whether this secretary should be excluded on the basis of confidentiality, the status of three other positions have been agreed upon by the parties and was not presented for determination here.

The second question raised was whether the two deputy probation officer positions should be excluded because Petitioner is no longer the employer, there is insufficient community of interest with other members of the unit or they are professional employees and should not be in a bargaining unit with non-professional employees. Although the NLRB is prohibited from placing professional employees in the same unit with non-professionals unless they, the professionals, desire to be in

the same unit, our act contains no such prohibition. This Board's practice has long been to include both in the same unit, if they have a sufficient mutuality of interest with other employees. Therefore, if their professional status is the only reason for excluding them I must conclude they are properly placed in the bargaining unit with other county employees represented by the Respondent.

A review of the evidence on the record, relative to the deputy probation officers, and a comparison of that evidence and any reasonable inference which could be made with the factors set forth in 24.26.611 ARM leads to the conclusion that they do have a community of interest with other employees in the unit. Certainly they have as much a mutuality of interest with the other employees as do, for example, employees of the Clerk of Court or Auditor. Their interest in wages, hours and fringe benefits must surely be the same as that of the other unit employees. There is nothing on the record to indicate otherwise. With respect to the history of collective bargaining, there is nothing to indicate there has been anything prior to the certification of this unit. And, as noted earlier, this Board's practice has been to certify broad units. The deputy probation officers are supervised by the chief probation officer; other members of the unit are supervised by their elected officials or chief deputies. If it is found that the Commissioners are the employers of all persons in the unit, then one could only conclude that supervision, in its broadest sense, is common. Personnel policies are the same for probation officers as for other employees--state law and the existing agreement make them so. There is nothing on the record to indicate that the extent of integration of work functions and interchange among the probation officers and other employees in the unit is any different than that of a Clerk of Court employee and a Treasurer employee. Therefore, if Lewis and

Clark County is the employer of the subject employees, there is no lacking of a community of interest to exclude them from the bargaining unit. The fact that they are required to work irregular hours at times is an insufficient reason to exclude them. Other employees in numerous other bargaining units are subject to call-back. Such matters are better dealt with at the table and ultimately in a wtitten collective bargaining agreement--as the parties have done.

Whether Lewis and Clark County, through its Board of Commissioners, or the District Court is the public employer for purposes of collective bargaining under Title 39 Chapter 31 MCA is a question which needs a more detailed examination. It also is a novel issue for the Board of Personnel Appeals. Petitioners contend that the Judiciary not the County is the public employer because the County does not set the deputy probation officers' wages, hours or working conditions nor does it hire, assign, lay off or fire them. Our law defines public employer as:

> ...the state of Montana or any political subdivision thereof, including but not limited to any town, city, county, district, school board, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and any representative or agent designated by the public employer to act in its interest in dealing with public employees. 39-31-103 (1) MCA.

From the above definition it is clear that the governing body of the political subdivision was meant to represent the public employer's interests in the collective bargaining process. Yet, it is also clear that the District Courts are not a part of County government and that, therefore, they are not included in the "political subdivision" which the County Commissioners are to represent. Section 41-5-705 MCA gives responsibility to the District Court judge for appointing and fixing the salaries of deputy probation officers within the stated limits. The statute says nothing about hours or other

working conditions. Other county officials have similar authority over their employees.

Section 39-31-103 (2) MCA defines "public employee" for purposes of the Act as:

> ... a person employed by a public employer in any capacity except elected officials, persons directly appointed by the governor, supervisory employees and management officials,... or member of any state board or commission who serve the state intermittently, school district clerks and school administrators, registered professional nurses performing service for health care facilities, professional engineers and engineers-in-training, and includes any individual whose work has ceased as a consequence of or in connection with any unfair labor practice or concerted employee action.

Deputy probation officers are, obviously not excluded from coverage by the above definition.

Section 39-31-301 MCA sets forth the identities of those responsible for bargaining with the exclusive representative:

> The chief executive officer of the state, the governoring body of a political subdivision, the commissioner of higher education, whether elected or appointed, or the designated authorized representative shall represent the public employer in collective bargaining with an exclusive representative.

Perhaps the only relevant conclusion which can be drawn from a review of all the pertinent parts of the Act is that deputy probation officers are public employees and are, therefore, entitled to all the rights, privileges and benefits of such employees. Nothing is stated specifically regarding the identity of their employer for purpose of collective bargaining. Without question, the District Court appoints them, sets their salary and through the chief probation officer assigns their work. However, as was reasoned by the U.S. Supreme Court in NLRB v. ATKINS & Co., 331 U.S. 398, 20 LRRM 2108 (1947), "the terms 'employee' and 'employer' in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purpose of the Act, the circumstances and background of particular employment relationships and all the hard facts of industrial life.

And so the Board in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of 'employer' and 'employee.' But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon the considerations is entitled to great respect by a reviewing court, due to the Board's familarity with the problems and its experience in the administration of the Act." (Emphasis added)

There is no clear delineation in our Act of who the public employer is for purposes of collective bargaining for the probation officers. Therefore, I beleive it is necessary that this Board look to the aims which the Legislature sought to achieve when it enacted the law. Our problem with this particular factual circumstance, although novel to this Board, has not been altogether unheard of in other jurisdictions. The state of Pennsylvania dealt with a similar problem in Sweet v. Pennsylvania Labor Relations Board, 322 A.2d 362, 87 LRRM 2248 (1974). There the Pennsylvania Supreme Court ruled that judges of the Court of Common Pleas were the employer of at least some of the employees included in the bargaining unit composed of Court-related employees. In Sweet v. PLRB, 99 LRRM 2486 (1978) the court ruled that the County Commisioners were the representatives for collective bargaining purposes because the Legislature had, since Sweet I, amended the law to make the Commissioners the bargaining representative. The statute expressly provided commissioners of counties of the third through eighth class with exclusive authority to represent all managerial interests in collective bargaining. The amendment also stated that the exercise of such responsibilities

by the commissioners would not affect the hiring, firing, and supervision right vested in the judges.

Again the Pennsylvania Supreme Court in Ellenbogen v. Allegheny County, 99 LRRM 248 (1978) said: "We think that the legislative judgment expressed in this amendment...should apply to all judicial districts." The Court went on to point out several important public interests promoted by the amendment, they are summarized as follows:

1. It promoted fiscal responsibility by allowing the county commissioners to make managerial decisions affecting the tax dollar. It permitted officials charged with providing revenue to assess whether employee proposals at the bargaining table were feasible and consistent with the overall administration of county fiscal and governmental affairs.
2. It avoided the difficulty of having too many decision makers and promoted swift and efficient bargaining proceedings. It also advanced the public interest in the settlement of labor disputes.
3. It recognized that judges are too scarce and too essential to the administration of justice to require them to perform the nonadjudicatory function of managerial representative at the bargaining table.
4. It avoided the difficult questions of the propriety of judges deciding appeals arising from proceedings in which they sat before the Board and at the bargaining table.
5. It made clear that by appointing county officials to sit on behalf of judges it in no way detracted from the authority of judges to hire, fire, and supervise employees.

The Pennsylvania Legislature's reasoning appears sound and, in my opinion, good public policy. A review of several other cases reinforces that opinion. In the absence of specific legislation courts have come to a number of conclusions with respect to who the employer should be. For example, in Ulster County v. CSEA Unit, Sheriff's Dept., 79 LRRM 2265 (1971), a county and its sheriff were held to be joint employers because each had an important degree of control over the employment relationships. The court stated "The statute mandates that employers negotiate with respect to the terms and conditions of employment... Obviously, these negotiations cannot be effective if employees are obliged to negotiate with an employer who is without power with respect to the matter in dispute."

In Costigan v. Local 696, 90 LRRM 2328, (1975) the Pennsylvania court ruled that where a city paid most of the employee salaries and other compensation costs and exercised considerable control over fringe benefits accorded employers it was a joint employer with the register of wills who had exclusive power to hire, fire, promote, and to direct the work of individuals working in his office. No single entity controlled the terms of the employment relationships. And, "The duty to pay an employee's salary is often coincident with the status of employer, but not solely determinative of that status." Sweet v. PLRB, 87 LRRM 2248 (1974). In AFSCME, Local 2396 v. City of Billings, 93 LRRM 2753 (1976) the Montana Supreme Court held that the Library board of trustees was not a wholly independent and autonomous entity separate and apart from the local governing body. The board of trustees was granted independent powers to manage and operate the library, but they were an adjunct of local government, the City of Billings.

It is abundantly apparent that the District Courts are not adjuncts of Montana County Government; however, I do not believe such relationships must exist as a prerequisite to a determination that the policy of the Act is best promoted by declaring the County Commissioners the employer for purposes of collective bargaining. Such policy does not infringe upon the judiciary's independence. In fact, all the reasoning set forth in Ellenbogen, supra, seems applicable here.

No insurmountable difficulties for labor, management or the judiciary should arise if the County is the public employer for collective bargaining purposes. Since the inception of the subject unit the Commissioners representative have negotiated for all the employees in the existing unit including the deputy probation officers. In order to abide by the 1979 law providing that the judge set the salaries of these employees,

the Commissioners need only confer with the judge. To hold that the probation officers belong in a unit of their own would, for all practical purposes, deny them their right to organize and bargain collectively. They are small in number and would be relatively ineffective as a bargaining unit. Problems relative to overtime pay for the deputies have been worked out by the parties.

To summarize, the employees right to organize and bargain effectively with their employer outweighs any advantage which might be found in removing them from the unit. In the absence of legislation to the contrary, I believe this Board's policy should be to keep the deputy probation officers in the existing unit--for the reasons discussed above.

V. CONCLUSION OF LAW

The administrative secretary to the administrative assistant to the Lewis and Clark County Board of Commissioners is a confidential labor relations employee within the meaning of 39-31-103 (12) MCA.

The deputy probation officers are properly a part of the existing bargaining unit, as modified above, which is appropriate under 39-31-202 MCA.

VI. RECOMMENDED ORDER

That the petition to exclude the administrative secretary position from the bargaining unit be granted and that the petition to exclude two deputy probation officers be denied.

VII. NOTICE

Exceptions may be filed to these Findings of Fact, Conclusion of Law and Recommended Order within twenty (20) days of service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period, the Recommended Order shall become the Order of the Board. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

Dated this 25th day of April, 1980.

BOARD OF PERSONNEL APPEALS

Jack H. Calhoun
Hearing Examiner

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I did on the 4th day of April, 1980 mail a true and correct copy of the above FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER to the following:

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